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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 518

W. L. GOOGINS,

Petitioner,

vs.

E. W. HABLE AND SONS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS AND BRIEF IN SUPPORT THEREOF.

CECIL C. ROTSCH,
DAVID L. TISINGER,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS.

To the Honorable Chief Justice of the Supreme Court of the United States and the Associate Justices of Said Court:

W. L. Goggins, praying that writ of certiorari issue to review the final judgment and decree of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas entered in that certain cause lately pending in said Court, being styled W. L. Googins, Appellant *vs.* E. W. Hable and Sons, Appellees, and numbered 2923 on the docket of said Court, shows:

Summary Statement of the Matter Involved

During World War II, Googins purchased certain heavy equipment from Hable. This equipment included several large tractors and bulldozers, and Googins paid Hable $48,200.00 as the agreed purchase price.

The sale was subject to the Emergency Price Control Act and certain regulations thereunder.

Googins thought the equipment was "warranted", but Hable says the sale was "as is".

The "as is" price, according to O. P. A. regulations, was $15,062.50 less than the $48,200.00 paid in cash by Googins. Googins here seeks to recover that difference, $15,062.50. (The equipment proved defective.)

That difference of $15,062.50 represents the difference between the "warranted" and the "as is" price. The courts below allowed Hable, nevertheless, to keep that difference in spite of finding that the sale was "subject to O. P. A.", and in spite of Hable's own pleading that the sale was "as is".

1. As to Jurisdiction

The courts below held that Googins was not damaged because the equipment had a "market value" equal to the purchase price of $48,200.00 (R. 4, 9). They recognized that the sale was subject to O. P. A. regulations, and said regulations made the maximum price $15,062.50 less than the price actually paid in cash, but, on the apparent theory that O. P. A. regulations could not put a ceiling on the "market", and thus that the common law measure of damages—the difference between market value and price paid—showed no loss to Googins, denied recovery.

The "*black* market" was thus legitimatized in Texas, subject to correction by this Honorable Court—The Supreme Court of the United States of America.

Jurisdiction of this case, therefore, results from the power of this Court to decide the Federal Question: Does the Price Control Act, and regulations thereunder, 50 U. S. C. A., App., 925e, M. P. R. 136, in effect January 1944, Sec. 1390.11, (a), (b), and (c), fix an enforceable ceiling on market value in cases involving breach of contract?

2. As to The Merits

Googins paid more than $15,000.00 in excess of the lawful price for "as is" equipment. He thought the equipment was impliedly warranted, but Hable says it was not warranted. When the equipment proved unsatisfactory, Googins sought restitution for his damages. These were refused on the "as is" theory.

Googins' theory is that, even though the equipment were assumed to be mechanically perfect, he is still entitled to recover his $15,062.50, the excess over that lawfully chargeable—as for money had and received—to prevent unjust enrichment.

Googins does not sue here for treble damages under the statute, but he asserts a statutory *right* to be charged properly or to be delivered the statutory warranty. The consequent damages, resulting from such cause of action, are fixed by the principles of common law. The courts below held the statutory remedy for treble damages to be exclusive.

Jurisdiction to Review

Jurisdiction of this Court is invoked under Title 28, Sec. 1257(3). The judgment of the Court of Civil Appeals became final, with the refusal of rehearing of the Application for Writ of Error from the Supreme Court of Texas on October 10, 1951.

The Question Presented

1. Whether the Court of Civil Appeals erred in finding and enforcing a market value in excess of the ceiling price permitted under the Emergency Price Control Act, and in refusing Googins recovery of such excess.

2. Whether the Court of Civil Appeals erred in holding that the Emergency Price Control Act does not allow a common law suit for an overcharge.

Reasons Relied On for the Allowance of the Writ

Googins paid more than the law allowed on an "as is" sale. He paid more than the maximum price. He has been refused recovery on the ground that the "market value" was equal to the purchase price.

The "market" thus recognized was the "black" market—not the O. P. A. market.

If the State Courts may thus ignore the Federal regulations, any real enforcement will become impracticable. The precise question here presented, however, for all its importance seems never to have been previously offered for decision by this Court.

It was not shown that Googins knowingly paid more than the lawful price. Actually, he thought he was getting *warranted* equipment.

The statute says he was overcharged. Unless that statute is to be spurned as unworthy, Googins is, as a matter of law, entitled to recover the amount of the overcharge.

Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case num-

bered 2923, W. L. Googins, Appellant *vs.* E. W. Hable and Sons, Appellees; and that the judgment of such Court be reversed, and for such other relief as Petitioner shall be entitled, and all costs.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 518

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E. W. HABLE AND SONS,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of Court Below

The opinion of the Court of Civil Appeals is reported in 237 S. W. (2d) 705 (R. 4-9).

II

Jurisdiction

The basis upon which the jurisdiction of this Court is being invoked is stated in the Petition, page 3.

III

Statement of the Case

Sufficient here is the "Summary Statement of The Matter Involved" in the Petition, ante pages 2-3.

IV

Specification of Errors

1. The Court of Civil Appeals erred in holding that "market value" in a breach of contract suit could exceed the maximum ceiling price.

2. Such Court erred in holding that the statutory remedy of treble damages was exclusive when applied to this action.

V

Summary of Argument

1. Market value could not exceed the ceiling price.

2. The penalty provision of the statute for treble damages did not exclude an action for recovery of actual damages, the amount to be determined at common law.

VI

Argument

1. Market value could not exceed the ceiling price.

It is judicially established, by the trial court's "Findings of Fact" (R. 2-4), that Googins paid $48,200.00. By such judicial findings it is also established that the sale involved was subject to O. P. A. regulations. Furthermore, it is undisputed that the price paid exceeded the maximum price by $15,062.50.

The sale being subject to O. P. A. regulations, neither party can now be charged with any intentional violation of

the regulations. Googins thought the sale was of *warranted* equipment; Hable thought it was an "as is" deal.

The price paid exceeded the legal maximum for "as is" equipment by $15,062.50.

(a) Googins purchased equipment which was impliedly *warranted.*

(b) The warranty was breached by outright repudiation.

(c) Under O. P. A. regulations the maximum value for unwarranted equipment was 55% of the base price, and, the measure of damages for breach of warranty being the difference between the contract price and the market value, Googins was consequently entitled to recover at least the difference between 80% and 55%.

When a warranty is breached there is a partial failure of consideration and the measure of the amount of that failure is "the difference between the contract price and the market value." *Gutta Percha and Rubber Manufacturing Company* v. *City of Cleburne,* 102 Tex. 36, 112 S. W. 1047, 1048.

As the Court stated in *Heisig Rice Company* v. *Fairbanks Morse & Company,* 100 S. W. 959, 960:

> "The purchaser retained the machinery, and, if the warranty of fitness and quality was breached, his measure of damages for the breach or partial failure of consideration was the difference between the market value of the machinery delivered and that contracted for, and such consequential damages as the facts authorized." 100 S. W. 960.

The trial court was of the opinion that Googins could not recover damages in that he found that the equipment was actually "rebuilt" by Hable and qualified according to O. P. A. standards. This finding of the trial court was erroneous since the equipment was undisputedly defective. For our purposes in discussing this first point of error, however, it is immaterial whether the equipment would qualify as "rebuilt" or not.

Hable chose to *repudiate* the warranty. Such repudiation was as serious a breach of contract as was the delivery of defective machinery.

> "A breach of contract is defined as 'a non-performance of any contractual duty of immediate performance.' It appears, however, that a sales agreement may be breached not only when one of the parties fails timely to perform a duty imposed upon him thereby, or when he wrongfully prevents performance by the other party, *but also when he repudiates the contract prior to the time fixed for performance.*" 37 Tex. Jur. 352, 353. (Emphasis supplied.)

The true inquiry was not about the performance of the machinery or its ability to perform. The true inquiry, the warranty being breached by absolute repudiation, was whether the *market value* was less than the contract price. Furthermore, inasmuch as Hable disavowed any warranty, the market value could not have exceeded the O. P. A. maximum for an "as is" sale.

The trial court was of the opinion that the equipment had a market value equal to the contract price because he found that the equipment was "rebuilt". He overlooked, however, that "rebuilt" equipment was something more than merely equipment which had been dismantled and so put back together that all of its worn parts were replaced with new ones. "Rebuilt" equipment, according to the mandate of the O. P. A., carried a warranty for *sixty days performance.*

Unless equipment carried a warranty the regulation required that it be sold "as is" or simply as "second-hand".

The maximum price under the law for second-hand unwarranted machinery was fixed by regulation at 55% of the base price. Since the evidence is undisputed that the $48,200.00 paid by Appellant was eighty per cent, the difference of 25% or $15,062.50 was due Googins as a matter

of law, as the amount which the contract price exceeded the market.

The trial court overlooked the very fundamental principle that a breach of contract may rest not only in a failure of performance, but also in a refusal to perform. The repudiation of a contract obligation gives rise to a cause of action for damages, just as does non-performance or insufficient performance. *Moore* v. *Jenkins,* 109 Tex. 461, 211 S. W. 975.

It was one thing for Googins to receive delivery of reconditioned machinery carrying no warranty, and quite another to receive the same equipment carrying a warranty for sixty days performance. The fact that the quality and condition of the machinery might be equally good in both instances is immaterial. So also is it immaterial whether the unwarranted equipment actually performed for sixty days according to standard required of warranted equipment. *The promise* to deliver warranted equipment was a substantial part of the consideration for which Googins contracted. When that *promise* was repudiated the consideration partially failed.

The consideration passing between the parties was not simply an exchange of money for property but more than that—it was an exchange of *promises.* The breach of contract occurred not simply because of a defect of performance but because of a *violation of a promise.*

A bilateral contract is an exchange of *promises.* (10 Tex. Jur. 14). Googins promised to pay a cash sum of $48,200.00. In return Hable promised to deliver *warranted* equipment. The equipment delivered was not warranted. The promise was therefore broken.

The warranty consisted of a collateral promise (which was to continue in effect for sixty days) to be responsible if the equipment failed to perform. When the equipment was delivered Hable immediately disavowed the collateral promise. Googins did not therefore receive all he was en-

titled to receive. He was delivered the equipment, but he was not delivered the collateral promise of warranty.

The Price Control Act required a warranty.

The Hables now concede that they repudiated that warranty.

The Hables do not contest the rule of law to the effect that the repudiation of a contractual obligation is a breach of the same just as much as is non-performance of it. They contend, however, that in spite of the repudiation we were not damaged because, as the trial court found, the market value of the equipment was equal to the purchase price.

To support this assertion they rely on cases such as *Ablon* v. *Hawker,* 200 S. W. (2d) 265, and *Betts* v. *Hitchcock,* 197 S. W. (2d) 878. These cases, say the Hables, hold that O. P. A. prices and market value are not synonymous.

Each and all of such cases represent situations where the owner of personal property has had the same destroyed, or has lost it by involuntary means as through theft, conversion, etc. The courts, quite naturally, have been unwilling in such instances to hold that one deprived of his property involuntarily should be limited to an OPA ceiling, provided he can show that its real value was greater. As those cases point out, the situation does not involve a *sale,* and that it is only with *sales* that the OPA has concern. Also, as those cases further point out, insurance losses are *expressly excluded* from OPA regulations. *Sun Ins. Ofc.* v. *Rupp,* 64 Fed. Supp. 533. Furthermore, such cases expressly recognize that in circumstances involving a *sale* the OPA prices, and the OPA prices only, reflect the maximum *market values.*

Where there is a sale involved, the OPA price must, of necessity control. This is the rule with respect to involuntary judicial sales. *Bowles* v. *Texas Liquor Control Board,* (Fifth Circuit), 148 Fed. (2d) 265. It does not apply in the case of a fire loss of an automobile simply because in that

situation the owner is not *selling*. *General Exchange* v. *Tierney*, (Fifth Circuit) 152 Fed. (2d) 224. As the Oklahoma court said in *Connecticut Fire Ins. Co.* v. *Youngblood*, 184 Pac. (2d) 795, actually in any true sense market value is always controlled by the OPA prices. The explanation for the rule that such prices will not be applied in the case of involuntary losses is not truly that such prices do not reflect maximum market value but rather that the courts are unwilling for a person to be deprived of his property at a price lower than its intrinsic value to him. *Sun Ins. Ofc.* v. *Rupp*, 64 Fed. Supp. 533.

Market value means the value obtainable at sales in the open market. To say that such value could be in excess of the price which the law allows seems to us the rankest kind of absurdity. It presupposes not only recognition of the illegal but approval of the illegal. *And the courts hold, in cases involving sales, that market value cannot exceed an OPA ceiling. Norwood Lbr. Co.* v. *McKean* (3rd Cir.) 153 F. (2d) 753, 757.

In *United States* v. *Sanitary District of Chicago* (7th Cir.) 149 F. (2d) 951, the court said:

> "(O.P.A. regulations) fixed a price of one cent per barrel as the maximum price to be charged for the storage of alcohol. This figure became the maximum lawful *market price.*" (149 Fed. 955).

One of the paramount purposes of the establishment of the Office of Price Administration was to offset inflation in the prices of machinery used in defense work. This Court judicially knows that tractors and bulldozers, such as are involved in this law suit, constituted equipment which made possible a large part of our effort during the last war. The literally hundreds of air fields, army camps, and military depots would have been utterly impossible to build without the aid of such equipment.

The purposes and policies of the Emergency Price Control Act are stated in Section 901a, Title 50, APP, USCA, as follows:

"(a) *The Congress affirms.*

> "(1) that because of abnormally excess spending power in relation to the presently available supply of commodities, rapid attainment of production equal to the public demand is one of the necessary and urgent objectives for the prevention of inflation * * *. And for the further purposes of protecting the real value of benefits provided by law for veterans and their dependents, of keeping faith with purchasers of United States War Bonds, and of making possible a successful transition to a peace time economy. * * *"

Of course, one of the costs which the government especially desired to prevent from being inflated was the cost of national defense. Sales such as those from Hable to Googins were, therefore, at the very core and center of the objective of price control legislation. To say that market value could exceed the minimum prices established by law is, in this case an affront to common sense. The San Antonio Court of Civil Appeals has held that rental value can not exceed O.P.A. ceiling prices. *Wooten* v. *Maierhofer*, 190 S.W. (2d) 513. There is no possible ground for a different rule here.

This is the real point in the case. It presents the question of the effect of OPA ceiling prices as evidence of value. See Note, *OPA Ceiling Prices as Evidence of Value*, 60 Harvard Law Review, 132 (1946).

The trial judge purported to find as a fact that the reasonable market value of the machinery was the same as the contract price, $48,200.00. The machinery did not carry the prescribed guaranty; hence, according to the law of the United States it could not have been sold for more than $33,137.50, in the condition it was delivered to the buyer. Thus, a difference of $15,062.50 between what the trial judge

said was the price that a willing buyer would pay to a willing seller and the price that the United States of America said would, if "willfully" exceeded, justify the imposition of a fine of $5,000.00 or imprisonment for two years, or both! 50 U.S.C. App., Sec. 925(b). We believe that the trial court's "finding" and the action of the Court of Civil Appeals in expressly affirming it, in the face of the showing that the machinery was subject to the 55% maximum price, is not particularly conducive to state-national harmony in our relatively well settled federal form of government. As said in *U. S.* v. *Delano Park Homes, Inc.*, 146 F. (2d) 473, 474 (C.C.A. 2d, 1944), "* * * when competent authority has fixed prices at a maximum, or has denied owners some specific use of their property, it is patently a disregard of its authority, either directly to allow a higher price on condemnation, or to allow the price to be figured in disregard of the limitation imposed."

And we think that the authoritative case law establishes that market value *cannot* be more than the OPA price ceiling. Such was the decision in *Miller* v. *Long-Bell Lumber Co.*, 222 S.W. (2d) 244, by the Supreme Court of Texas in 1949. That was a suit in *quantum meruit* for the reasonable value of lumber furnished to the defendant. The jury found that it was a certain amount, but the OPA price ceiling was $790.69 less than that, whereupon the court rendered judgment for the "reasonable value" found by the jury reduced to the amount that a willing seller *could* legally sell to a willing buyer.

Another authoritative decision is *Wooten* v. *Maierhofer*, Tex. Civ. App., 190 S.W. (2d) 514, error refused w.m. (1945), favorably commented upon in Note, OPA Ceiling as Evidence of Value, 60 Harvard Law Review 132, 138 (1946). In that case the sole and only question was whether the reasonable rental value of premises wrongfully withheld could be more than the ceiling price; that was the only ques-

tion in the case. It was squarely held it could not; the Supreme Court of Texas' refusal of a writ of error necessarily approved that holding. See Rule 483, Texas Rules of Civil Procedure, as it read in 1945.

2. The penalty provision in the Statute for treble damages did not exclude an action for recovery of actual damages, the amount to be determined at common law.

This action was for restitution—not for a penalty. The Hables have sought (and, so far, successfully) to show that this is actually just a penalty action and therefore barred by the one-year statute of limitation.

The Emergency Price Control Act itself provides for a remedy for overcharges in the case of a consumer purchaser. No provision is made for a purchaser who is not a consumer. He is left to the common law remedy, and the cases clearly demonstrate that he is entitled to *restitution for the amount of the overcharge.*

For example, in the case of *Compania Importadera* (Sup. Ct. N.Y., 1945), 58 N.Y.S. (2d) 745, the purchaser of steel for use in the course of his business sued for damages sustained by reason of overcharges. The Court stated the question for decision to be whether: "* * * * A buyer in the course of a trade or business from whom the seller has extracted an excess over the ceiling price may recover such excess despite the absence from the statute of any provision conferring such right".

In a well-reasoned opinion the Court held that plaintiff was entitled to recover. At page 745 of its opinion the Court said:

> "It is a general and long settled rule that where a statute commands or prohibits a thing, a person injured by another's failure to do the thing commanded or by his doing the thing prohibited, has a cause of action against the violator of the statute for the ensuing damages."

And the Court further reasoned:

> "The liability for penalty of treble damages * * * was inserted in order to enlist the help of consumers in discouraging violations because Congress foresaw that the task of enforcing the act against retailers would be too vast for the Administrator to accomplish without such help (*Bowles* v. *American Steel*, 78 U.S. App. D.C. 238, 139 F. (2d) 377, 379, cert. den. 322 U.S. 730, 64 S. Ct. 947, 88 L. Ed. 15653) and it is inconceivable to me that Congress intended to enlist the help of consumers in that way and yet intended to leave to administrative action alone the vastly greater task of enforcing the act against wholesalers who sell to the retailers. *The evil at which the statute is aimed is rising prices, and civil liability to refund any excess over legitimately fixed ceiling prices not only has a reasonable and just relation to avoidance of that evil, but is in my opinion one of the best means of avoiding such evil and of securing compliance with the statute.*"

And the Court held:

> "*I conclude therefore, that plaintiff and the transaction here in question have such relation to the objects and purposes of the statute that defendant's violation thereof gives rise to a cause of action for the recovery of what defendant's violation caused plaintiff to lose.*"

Another case involving this exact point is *Tuskegee Homes Co.* v. *Oswalt* (Sup. Ct. Alabama, 1946), 26 So. (2d) 865. There, in a suit by a purchaser for overcharges, the Court said:

> "To the extent that complainant is seeking recovery for the amount of his overcharges, not treble damages as a penalty, the complaint is so framed as to not be controlled by the statute (50 USCA appendix, Section 925(e)). *It is predicated to that extent solely on the theory of a common law right to recover for money obtained by a constructive fraud, which is available*

whether or not complainant purchased for use or consumption other than in the course of trade or business.''

Googins' claim here is like those in the above cases, not based on the statutory remedy. It is the assertion of a common law right and is entirely independent of the statute. The statute defines the wrong; the common law provides the remedy for its breach. Googins seeks to recover for the defendant's unjust enrichment. Googins, of course, thought he was purchasing ''rebuilt and guaranteed'' equipment within the meaning of the O.P.A. regulations. Since the Hables have disavowed any such agreement, and have chosen to treat the sale as an ''as is'' sale they cannot rightfully retain any of the purchase in excess of 55% of the O.P.A. base price.

When the Legislature gives a remedy for a right newly created, that remedy, of course, is conclusive. But where, as in this case, no remedy is provided in the statute the common law supplies the remedy. As our Supreme Court said in *House* v. *Houston Waterworks Company*, 88 Tex. 233, 31 S.W. 179, 181:

> ''Whenever a statute creates a right or duty or an obligation, then, although it has not in express terms given a remedy, the remedy which by law is properly applicable to that right or obligation follows as an incident. * * * In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to said law.''

There must be literally hundreds of statutes on our books which do not expressly provide for a remedy. For example, the dozens and dozens of statutes regulating the use of our highways by automobiles. These statutes are commonly denominated criminal statutes and provide a criminal penalty, yet no one has ever doubted that a person injured by

reason of a violation of such statutes, as where the other party is driving over the speed limit, or driving at night without lights, or driving with inadequate brakes, has his remedy at common law.

As the writer says in 1 Am. Jur., 410:

> "As to the enforcement of a general liability created by statute and unknown to the common law, the rule is that if no remedy is provided by the statute, it may be enforced by an appropriate common law action, a definite statutory prohibition of conduct indicating an intention that the right conferred shall be enforceable by legal proceedings."

The fact that the statute gives the administrator the right to collect a penalty does not detract from the proposition that a duty is created by the statute of which Googins may take the benefit in this case. As is stated in 1 Corpus Juris 952:

> "It is a general rule, that whenever a statute imposes a duty for the benefit of particular individuals or classes of individuals, anyone within the benefit of the statute who sustains an injury by reason of a breach thereof has a right of action against the person guilty of the breach. This rule applies not only to statutory duties of public officers, but also to duties imposed by statute upon any citizen; and the private right of action is not affected by the fact that the statute also makes such breach of duty a criminal offense, *or the subject of a penalty.* Or by the fact that the statute which imposes a duty does not in terms prescribe any remedy for its enforcement or violation." (Emphasis supplied.)

The situation before us is analogous to the railroad cases. From the very beginning of Texas history, shippers have been allowed to recover illegal overcharges made for freight by carriers. 8 Tex. Jur. 201. The fact that the statutes also provide for heavy penalties for extortion has

apparently never been thought to exclude the right of simple restitution to the plaintiff who did not desire to avail himself of the statutory penalty. The statutory remedy in such cases "is not exclusive but cumulative." *Murray and Brother* v. *G.C. & S.R.R. Co.*, 63 Tex. 407, 413. The San Antonio Court held in *Galveston H. & S.C. Ry.* v. *J. H. Nations Meat and Supply Company*, 136 S.W. 833, that it was perfectly proper to sue for the overcharge without suing for the penalty.

It is a penal offense for electric light companies to overcharge a customer. 16 Tex. Jur. 236. Yet the private citizen may sue to recover the amount of the overcharge, in Texas courts. *Texas Power and Light Company* v. *Doering*, 139 Tex. 351, 162 S.W. (2d) 938. He may even recover his actual damages when other persons are *undercharged*. *Kousal* v. *Texas Power and Light Company* (Sup. Ct. of Tex.) 179 S.W. (2d) 283.

We are unable to understand on what basis the Hables can contend that the following doctrine does not apply:

> "It is a well established doctrine, both by courts of law and of equity, that, where one person has received money of another which in honesty and good conscience, he cannot retain, an action will lie by the party entitled to recover it back, and whether the action be in assumpsit or for money had and received under our code is immaterial." 29 Tex. Jur. 736, 737.

In *Henderson* v. *Jones & Laughlin Steel Corp.*, 46 Fed. 518, the court held that when a commercial purchaser bought scrap for use in its business, and was charged a price in excess of the OPA ceiling, it could set off the amount of that excess in its accounts. Surely that court would also have allowed recovery by lawsuit.

Conclusion

It is respectfully submitted that this case calls for the exercise of the supervisory powers of this Court, and that the writ should be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 518

W. L. GOOGINS,

Petitioner,

vs.

E. W. HABLE & SONS

On Petition for Writ of Certiorari to the Court of Civil Appeals for the 10th Supreme Judicial District of Texas

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the Court of Civil Appeals (R. 4-9) is reported at 237 S. W. (2d) 705. The opinion quotes in full the findings of fact and conclusions of law of the District Court. (R. 5-8), 237 S. W. (2d) at 706-707.

Jurisdiction

The Supreme Court of Texas denied rehearing of the application for writ of error October 10, 1951.

The petition for certiorari was filed in this Court on January 8, 1952. Petitioner has invoked the jurisdiction of this Court under 28 U.S.C., Section 1257(3).

Question Presented

Petitioner, a dealer, in the course of trade having purchased for resale commodities at over ceiling prices admittedly had no right of action under the Emergency Price Control Act. Did he nevertheless have a Federal right to recover the amount of the overcharge?

Statute Involved

The statute involved is the Emergency Price Control Act of 1942, as amended. Pertinent portions of the Act are copied in the Appendix, *post*, p. 15.

Statement

Petitioner claims that the courts below erred in not awarding damages in the sum of $15,060.00, the difference between the price paid and the alleged maximum price allowed by O.P.A. regulations for certain used or re-built heavy construction equipment.

"The equipment was not bought by the plaintiff for his own use, but was bought by him for purpose of re-sale." (Finding 11, R. 7.) Consequently, Petitioner did not buy such commodities "for use or consumption other than in the course of trade or business."

"The equipment was bought more than one year after the completion of the contract of purchase and sale aforesaid." (Finding 12, R. 7.) Consequently Petitioner did not bring the action "within one year from the date of the [alleged] violation."

By the terms of the Act the Petitioner was *not entitled* to bring an action for damages under the Act, and *because* he was not so entitled, the Administrator *was* empowered by the Act to bring such an action.

Argument

This action was not brought to recover damages that are said to be allowed by the Emergency Price Control Act. Petitioner does not claim that he purchased the equipment for use or consumption other than in the course of trade or business. He does not claim that he was within the class of persons entitled by the Emergency Price Control Act to "bring an action against the seller on account of the overcharge." Sec. 205(e).

Without undertaking to translate petitioner's contention we take it as he states it:

"Googins does not sue here for treble damages under the statute, but he asserts a statutory *right* to be charged properly or to be delivered the statutory warranty. The consequent damages, resulting from such cause of action, are fixed by the principles of common law." (Petition for Certiorari, 3.)

"Googins' claim here is like those in the above cases,[1] not based on the statutory remedy. It is the assertion of a common law right and is entirely independent of the statute. The statute defines the wrong; the common law provides the remedy for its breach. * * *

"When the Legislature gives a remedy for a right newly created, that remedy, of course, is conclusive. But where, as in this case, no remedy is provided in the statute the common law supplies the remedy." (Petitioner's Brief, 18.)

We propose to demonstrate that Petitioner's contention is devoid of merit, and presents no substantial Federal question.

The basic trouble with Petitioner's theory is that it leaves out of account the circumstance that while the statute denounces as unlawful the *sale* at the over-ceiling price, it also condemns as unlawful the act of *purchasing* at such price. A single sentence of the Act makes it unlawful for any person to sell, and for any person "in the course of trade or business to buy or receive any commodity" in violation of any effective price schedule under the Act. Sec. 4, 56 Stat. 28; 50 U.S.C. App. §904(a). *No violator is by the Act entitled to sue at all.* And if a buyer "is not entitled for any reason to bring the action the Administrator may institute such action on behalf of the United States within such one-year period." Sec. 205(e), 56 Stat. 34; 50 U.S.C. App. §925(e).

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[1] *Compania Importadera v. Caldwell* (S. Ct. N. Y. 1945), 58 N.Y.S. 745; *Tuskegee Homes Co. v. Oswalt* (Ala. 1946), 26 So. (2d) 865. As to these two cases, see *post*, p. 11.

The Act divides buyers into two classes: those who buy as non-commercial consumers, and those who buy as commercial consumers or traders. Those who fall within the first class are entitled to bring an action within a limited period. Members of the second class are *not entitled* to bring an action at all. Since by the Act they are not entitled to bring an action, the Act simply creates no cause of action in their behalf.

Petitioner confuses his asserted "statutory *right* to be charged properly" with the right of action for the overcharge after he has participated as a violator in the transaction. The former is accorded him, and the latter is denied him, by the Act.

Petitioner says: "The penalty provision in the Statute for treble damages did not exclude an action for recovery of actual damages, the amount to be determined at common law." (Petitioner's brief, 16.) But the statute is not merely a penalty statute. In behalf of those entitled by the Act to sue at all it creates a right of action in damages. The Court may allow a maximum of three times the amount of the overcharge. But the statute itself provides that the amount of damages "shall be the amount of the overcharge" if the defendant proves that the violation "was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation." Sec. 205(e); 50 U.S.C. App., § 925(e).[2]

[2] At the time of the trial of the present action (March 1950) the amendment of June 30, 1944 (Stabilization Extension Act of 1944), reducing the damages against a defendant in any action, under the facts above found, to the amount of the overcharge was applicable. *Bowles v. Glick Bros. Lumber Co.* (9th Cir.), 146 F. (2d) 566, 571; *Bowles v. Franceschini* (1st Cir.), 145 F. (2d) 510, 513-514.

Here the court has found that if there was a violation, "such was neither wilful on the part of the Defendant nor the result of his failure to take practical precautions." (Finding 13, R. 3.)

Assuming, contrary to fact, that petitioner purchased the equipment as a non-commercial consumer he could have brought a timely action and the damages would have been limited to the "amount of the overcharge."

He now contends that although he purchased the equipment in the course of trade and consequently was *not entitled* to bring an action under the statute, the statute nevertheless gives him the right to bring an action, in which by invoking common law remedies he may recover the "amount of the overcharge."

It is incorrect to speak of the statute as a penalty statute. Against defendant, not a wilful violator, the most that a non-commercial consumer could have recovered would have been the exact amount that the petitioner seeks to recover in the present action.

Petitioner's case then comes to this: although the statute *denies* him the right to recover the overcharge in an action for damages under the statute, it *gives* him the right to recover the same amount of damages in an action at common law. Unless this is his *claim*, he asserts no Federal right.

We have no occasion to answer the extended argument challenging the judgment and opinion below upon grounds wholly unrelated to the Federal statute. As to these non-Federal questions the highest court of the State has spoken. If these questions were now at issue, we should welcome the opportunity to discuss them. In this respect the State courts

stand in no need of defense. We undertake to answer petitioner's claim of Federal right.

In *Speten v. Bowles* (8th Cir.), 146 F. (2d) 602, cert. den. 324 U. S. 877, the Court remanded the cause to allow the defendant to prove if he could that his violation of the regulation was neither "wilful nor the result of failure to take practical precautions against the occurrence of the violation." This was for the purpose of enabling the defendant to reduce the damages to the amount of the overcharge if he could make the requisite proof. The right of the Administrator to prosecute the action was upheld on the ground that the purchaser, having bought the machinery for use or consumption in the course of his trade or business as a farmer, was not entitled to sue. In short, the Court held that the farmer was not entitled to sue at all and consequently the Administrator was entitled to bring an action for the overcharge. In the present case the petitioner occupies precisely the position that in the *Speten* case was occupied by the farmer purchaser. If by force of the statute the petitioner here is entitled to bring this action, it is hard to see why the Administrator was entitled to bring the action against *Speten*. Unless by force of the statute the petitioner here was entitled to bring this action he has no Federal right.

The Congressional intent to which the Act gives expression is that the non-commercial consumer, whose participation in an over-ceiling purchase is not condemned, shall have a measure of relief, but that the commercial consumer or dealer whose act of purchasing is declared to be unlawful, shall have no relief, at least none other than such as may flow

incidentally from an action by the Administrator. (It would be an obtrusion to inject here the question upon which the Court divided in *Porter v. Warner*, 328 U. S. 395.)

In *Bowles v. Trullinger* (9th Cir.), 152 F. (2d) 191 (1945), the court explained:

"At the hearings on Price Control Bill, House Report No. 5990 (77th Congress, 1st Session, 1941) page 141, it is evident that Congress intended to make a distinction between the two classes of buyers. It was pointed out in the hearings that a great deal more pressure was exerted on sellers by persons who buy in the course of trade or business, or for commercial reasons, and so the price regulations were made equally applicable to those purchasers. Since this type of purchaser had no right to sue the seller, the right to recover statutory damages for violation of the maximum price regulations in the case of industrial buyer or buyers in the course of trade or business was vested only in the Administrator. *Non-commercial consumers are the only ones empowered by the Act to bring suit for overcharge.* See also Senate Report 931, page 8, (77th Congress, 2d Session), and House Report 1658, page 26 (77th Congress, 2d Session.)" 152 F. (2d) at 192. (Emphasis added.)

The court held that since the purchaser was not a non-commercial consumer he had no right of action and that in consequence the Administrator was entitled to sue.

In *Armour & Co. v. Blindman* (Dist. Ct. Minn.), 73 F. Supp. 609 (1947), the action was by a non-consumer who purchased boxes at over ceiling prices without knowing that the prices were excessive, relying upon seller's assurance that the prices were not

excessive. The Court said that the question was: "Does Section 925(e) of the Emergency Price Control Act constitute the exclusive remedy available to purchasers of over-ceiling commodities?" 73 F. Supp. at 610. Answering, the court said:

"It cannot be seriously contended that, when Congress specifically termed a purchaser at overceiling price in the course of trade or business a law violator, it did not do so advisedly. * * *" 73 F. Supp. at 610.

"The clear intent of Congress to vest the Administrator with the exclusive right to institute suit where an overceiling sale is made to one in the course of trade or business, cannot be circumvented by any legal legerdemain in styling the action as one in equity to force one unjustly enriched to disgorge, or on the theory of breach of warranty or fraud. The right of action, regardless of the allegations contained in the complaint, is a creature of statute. It was unknown at common law and it is to the statute that we must look in order to determine what rights plaintiff has thereunder." 73 F. Supp. at 611.

Further:

"If plaintiff's position is sound, the defendants would not only be subject to a treble damage action by the Administrator, but to a single action by the plaintiff as well. To countenance, therefore, the action which plaintiff now seeks to sustain would do violence to the carefully planned legislation which Congress enacted for the purpose of defeating inflation. * * *" 73 F. Supp. at 612.

The construction of the Act in *Armour v. Blindman, supra*, fatal to the present petitioner's case, is supported by all of the Federal courts that have had

occasion to consider the question. It is supported also by all of the applicable State court cases with the exception of the two cases relied upon by petitioner, hereinafter noticed, *post*, p. 11. Some of the supporting cases are listed in the footnote below.[3]

Illustrative of the supporting State court decisions are *Foley v. Day Bros. Inc.*, 320 Mass. 344, 69 N. E. (2d) 451 (1946), and *Marrow Mfg. Corp. v. Eitinger*, 185 Misc. 900, 58 N.Y.S. (2d) 11, affirmed without opinion 296 N. Y. 760, 70 N. E. (2d) 557. Because it is apposite and completely answers petitioner's contentions, we reproduce in the Appendix Justice Pecora's opinion in *Marrow v. Eitinger*, *post*, p. 17.

In *Foley v. Day Bros. Inc.*, *supra*, plaintiff brought an action to recover damages under the Emergency Price Control Act for violation by defendant of maximum price regulations in the sale of a motor tractor. The court held that the Act and the amendment

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[3] Federal Court Cases: *Bowles v. Rogers* (and three other cases ruled by the same opinion) (7th Cir.), 149 F. (2d) 1010, *per* Judge Minton; *Bowles v. Seminole Rock & Sand Co.* (5th Cir.), 145 F. (2d) 482 (reversed on other grounds 325 U. S. 410); *Bowles v. Jones* (10th Cir.), 151 F. (2d) 21; *Bowles v. Glick Bros. Lmbr. Co.* (9th Cir.), 146 F. (2d) 566, certiorari denied because brief in support of petition is not "direct and concise," 325 U. S. 877.

State Court Cases: *Alba Trading Co., Inc. v. Constants*, 181 Misc. 778, 47 N.Y.S. (2d) 138; *Marrow Manufacturing Corp. v. Walco Bead Co., Inc.*, 296 N. Y. 764, 70 N. E. (2d) 558; *Pittsburgh Fabric Products Co. v. Geller*, 65 N.Y.S. (2d) 461; *Marrow Mfg. Corp. v. Eitinger*, 185 Misc. 900, 58 N.Y.S. (2d) 11, affirmed 296 N. Y. 760, 70 N. E. (2d) 557; *Edsil Trading Corp. v. John Minder and Sons*, 188 Misc. 1029, 70 N.Y.S. (2d) 229; *Foley v. Day Bros.*, 320 Mass. 344, 69 N. E. (2d) 451; *Grindle v. Brown*, 321 Mass. 182, 72 N. E. (2d) 431; *Bledsoe v. Coxe Lumber Co.*, 229 N. C. 128, 48 S. E. (2d) 50 (1948).

of June 30, 1944, "give the buyer of a commodity sold in violation of a regulation, order or price schedule prescribing a maximum price, a right of action against the seller, but only if the buyer buys such commodity 'for use or consumption other than in the course of trade or business.' *Otherwise only the price administrator can sue the seller.*" (Emphasis added.) 320 Mass. at 345, 69 N. E. (2d) at 452.

Cases Relied Upon by Petitioner

The two cases upon which petitioner relies as affording direct support for his contention are *Compania Importadera v. Caldwell* (S. Ct. N. Y. 1945), 58 N.Y.S. (2d) 745, and *Tuskegee Homes Co. v. Oswalt* (Ala. 1946), 26 So. (2d) 865 (Petitioner's brief, 16-18).

The decision in the *Compania Importadera* case has been overruled, in effect, by the New York Court of Appeals in *Marrow Mfg. Corp. v. Eitinger*, 269 N. Y. 762, 70 N. E. (2d) 557 (Nov. 27, 1946), which affirms, without opinion, the decision of the Supreme Court, *per* Pecora, Justice, 185 Misc. 900, 58 N. Y. Supp. (2d) 11.

In the *Compania Importadera* case Justice Walter said: "The conclusion here reached is inconsistent with *Alba Trading Co. v. Constants*, 181 Misc. 778, 48 N.Y.S. 138, and *Marrow Mfg. Corp. v. Eitinger*, 185 Misc. 900, 58 N.Y.S. (2d) 11; but all that I can say about that is to express my regret at finding myself in disagreement with one of my colleagues." 58 N.Y.S. (2d) at 750.

As to the case of *Tuskegee Homes Co. v. Oswalt, supra,* we comment:

(a) It was dismissed on demurrer. The plaintiff alleged that he purchased the lumber as a consumer, but the court deemed it unnecessary to decide that question. 26 So. (2d) at 870.

(b) The Alabama Court (June 1946) relied in part upon *Compania Importadera v. Caldwell, supra,* prior to the action of the New York Court of Appeals (November 1946) resolving the conflict between that case and the two cases of *Marrow Mfg. Corp. v. Eitingen, supra,* and *Alba Trading Co. v. Constants, supra.*

(c) Plaintiff alleged that defendant agreed to charge the legal O.P.A. price, and that plaintiff relied upon the invoices as representations that the price was legal. The court treated this as presenting a *prima facie* claim for the recovery of the overcharge whose payment was procured by a constructive fraud.

(d) The Court incorrectly construed *Porter v. Warner,* 328 U. S. 395, as supporting the view that if the Administrator can appropriately require restitution in a bill in equity, the purchaser is entitled to similar relief in an equity proceeding brought by him.

The two cases relied upon by petitioner, *Compania Importadera v. Caldwell, supra,* and *Tuskegee Homes Co. v. Oswalt, supra,* are completely answered by Justice Pecora in *Marrow Mfg. Co. v. Eitinger, supra,* affirmed by the New York Court of Appeals, Appendix, *post,* p. 17.

Conclusion

Petitioner complains of the action of the Texas courts in refusing to award damages in the amount of the claimed overcharge. Since the courts below found that the violation of the regulation by defendants "was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation," this is all that petitioner could have recovered if he had been a non-commercial consumer. Petitioner's asserted claim is precisely the claim that he would have had if he had been entitled to bring an action under the Act. By the terms of the Act he was not entitled to bring such an action. Consequently by the terms of the Act he was not entitled to recover the overcharge. By the judgment below he has been denied no Federal right.

We respectfully submit that the petition for certiorari should be denied.

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APPENDIX

Statute Involved

Pertinent portions of the Emergency Price Control Act are these:

Section 4:

"It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202(b) or section 205(f) (sections 922(b) or 925(f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing." Jan. 30, 1942, Ch. 26, Tit. I, §4, 56 Stat. 28, 50 U.S.C., War, Appendix, Sec. 904(a).

Section 205(e):

"If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In an action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the follow-

ing sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be banned from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered." U. S. Code, Title 50,—War, Appendix, Sec. 925(e); Ch. 26, Tit. II, Sec. 205(e), 56 Stat. 33; as amended by the Act of June 30, 1944, Ch. 325, Tit. I, Sec. 108, 58 Stat. 640.

The proviso in the Act reducing the damages to the amount of the overcharge if the defendant proves

that the violation "was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation" was added by the amendment of June 30, 1944. It was carried forward in the amendment of July 30, 1947. The record shows that the trial of the present action began March 16, 1950, and judgment was entered March 23, 1950 (R. 1). This was before the effective date of the Price & Wage Stabilization Act of September 8, 1950, although the above proviso was continued without change in that Act. 64 Stat. 811; 50 U.S.C., App. Sec. 2109(c).

Opinion in Marrow Mfg. Corp. v. Eitinger

Opinion (referred to *ante*, p. 10) in *Marrow Mfg. Corp. v. Eitinger*, 185 Misc. 900, 58 N. Y. Supp. (2d) 11, affirmed, without opinion, 269 N. Y. 762, 70 N. E. (2d) 557 (Nov. 27, 1946).

"Pecora, Justice:

"Defendant moves to dismiss the complaint upon the ground that it fails to allege facts sufficient to constitute a cause of action and that plaintiff has not the capacity to sue. The first cause of action is based upon the alleged improper and excessive price which it paid to defendant for merchandise covered by the Emergency Price Control Act of 1942, 50 U.S. C.A. Appendix §901 et seq., and the Maximum Price Regulations issued pursuant thereto. Recovery is sought for the difference between the amount paid and the maximum to which defendant would be entitled by law. In the second cause plaintiff seeks to recover the same amount upon allegations that defendant fraudulently misrepresented that the prices

charged for the merchandise were proper and legal, and determined in accordance with the Price Control Act and the Maximum Price Regulations; that plaintiff relied upon such representations and paid the excess sued for. Plaintiff does not allege that the merchandise was purchased 'for use or consumption other than in the course of trade or business.' It clearly appears that the commodity in question was sold 'in the course of trade or business.' It was held in *Lightbody v. Russell*, 293 N. Y. 492, 58 N. E. (2) 508, that where a commodity is purchased in the course of trade or business, the purchaser may not sue to recover treble damages under the Price Control Act, Section 205(e); 50 U.S.C.A. Appendix, §925(e). Plaintiff here does not sue for treble damages, since plaintiff did not purchase for use or consumption other than in the course of trade or business. This Court held in *Alba Trading Co., Inc. v. Constants*, 181 Misc. 778, 779, 47 N. Y. S. (2) 138, 139, 'that any remedy which exists * * * must under Section 205(e) be pursued by the Administrator and cannot be availed of by plaintiff, who is not a consumer-purchaser.' There too the suit, like the case at bar, was by a purchaser to recover the excess paid over the maximum price. Thus here too plaintiff may not sue to recover the excess. Any action for such purpose must be brought by the Administrator of the Office of Price Administration.

"By couching the second cause of action in terms of fraud, plaintiff cannot avoid the effect of such ruling. The remedy against a seller is statutory, based upon legislation with a definite public policy. Plaintiff was under the law duty bound to know, and will be presumed to have known, the maximum price. Recovery upon any theory can only be had in a suit brought by the Administrator. The recent decision in *International Spangles Corporation v. Marrow Mfg. Corp.*, 294 N. Y. 295, 62 N. E. (2) 77, in no way conflicts with the result reached. That case

merely holds that a seller who has violated the provisions of the Price Control Act may not recover the price of the goods sold where that price exceeds the maximum price fixed in conformity with the Price Control Act and the Maximum Price Regulations. It does not follow that because a seller who violates the law is barred from a recovery, that the buyer who has paid an excessive price can recover the excess. There are specific provisions in the Price Control Act which make it unlawful for a person to sell or deliver any commodity in violation of any regulation promulgated under the Act. To permit a seller to recover where the Act is violated would be tantamount to sanctioning the violation. But as to a purchaser's recovery from a seller, the Price Control Act prescribes an exclusive remedy. Suit by a purchaser can only be brought where he is a consumer. Plaintiff does not fall within that category and therefore may not pursue that remedy." 50 N.Y.S. (2d) 11, 12-13.